FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

August 21, 1997

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RONALD ZIPPER, Debtor.	BAP No. KS-97-025
HEALTH MIDWEST OFFICE FACILITIES CORP. Plaintiff-Appellant, v. RONALD ZIPPER and DAVID R. BROWNING, Defendants-Appellees.	Bankr. No. 92-20971-11 Adv. No. 92-6085 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the District of Kansas

Before CLARK, BOHANON, and CORNISH, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

After examining the briefs and appellate record, this Panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

Health Midwest Office Facilities Corporation, Plaintiff-Appellant ("Health

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Midwest"), appeals: (1) an order of the United States Bankruptcy Court for the District of Kansas pronounced orally on September 27, 1996 ("Oral Order"), sustaining the Motions for Directed Verdict filed by the Defendant-Appellees, Ronald Zipper, the chapter 11 debtor ("Debtor"), and his attorney David R. Browning ("Browning"); and (2) an order entered by the Bankruptcy Court on April 1, 1997, denying Health Midwest's Motion to Amend or Reconsider the Oral Order ("Reconsideration Order"). *See* Health Midwest Office Facilities Corp. v. Zipper (In re Zipper), 207 B.R. 695 (Bankr. D. Kan. 1997). For the reasons set forth below, we conclude that we lack appellate jurisdiction over this appeal and, therefore, dismiss it without prejudice.

I. BACKGROUND

Health Midwest is the successor in interest to Medical Center Park, Inc. ("MCP"), the owner of a building from whom the Debtor leased space to conduct his medical practice. After the Debtor filed a petition seeking relief under chapter 11 of the Bankruptcy Code, MCP filed a motion for relief from stay seeking to evict the Debtor from the premises, and the Debtor filed a cross motion for sanctions alleging that MCP had violated the stay ("Relief from Stay Litigation").

A settlement agreement in the Relief from Stay Litigation ultimately was reached. On June 8, 1992, counsel announced the terms of the settlement agreement to the Bankruptcy Court on the record, and the Bankruptcy Court stated "I will approve such [agreement] when it is submitted." Zipper, 207 B.R. at 701 (attaching and incorporating by reference partial transcript dated June 8, 1992).

On June 19, 1992, a Journal Entry memorializing the settlement agreement, which was approved as to form and content by counsel for MCP and the Debtor, was filed with the Bankruptcy Court. It was executed by the Bankruptcy Court that same day.

On July 7, 1992, MCP filed a "Motion for Order of Contempt and Temporary Restraining Order Against Debtor and Debtor's Attorneys [sic]" (the "Contempt Motion") which commenced an adversary proceeding in the Bankruptcy Court against the Debtor and Browning, seeking damages for civil contempt (the "Contempt Proceeding"). Appellant's Appendix, Tab 1. MCP alleged that the Debtor and Browning had breached the court-approved settlement agreement in the Relief from Stay Litigation. MCP subsequently amended the Contempt Motion to include a request for damages based on conversion. Appellant's Appendix, Tab 4, Pretrial Order filed October 2, 1992, p. 6. This amendment to the pleadings was consented to by the Debtor and Browning as it was included in a Pre-Trial Order which was signed by Browning on behalf of the Debtor and himself. Id.

MCP was subsequently dissolved and terminated. On October 13, 1995, the Bankruptcy Court ordered that Health Midwest, as successor interest to MCP, be substituted as the plaintiff in the Contempt Proceeding pursuant to Federal Rule of Bankruptcy Procedure 7025. Appellant's Appendix, Tab 3.

After a trial on September 27, 1996, the Bankruptcy Court made factual findings and conclusions of law on the record, constituting the Oral Order, one of the orders subject to this appeal. The Bankruptcy Court concluded, in relevant part, that the Debtor, acting upon the advice of and possibly with the assistance of Browning, breached the court-approved settlement agreement in the Relief from Stay Litigation. Although the Debtor breached the agreement, the Bankruptcy Court stated that it would enter a directed verdict in favor of the Debtor and Browning because: (1) for civil contempt to issue, it was necessary to violate an order of the Court; and (2) the June 19, 1992 Journal Entry was not an order of the Court, but rather merely the Bankruptcy Court's approval of the Relief from Stay Litigation settlement agreement. *See* Zipper, 207 B.R. at 703-708 (attaching and incorporating by reference partial transcript of the hearing on

September 27, 1996).

In the Oral Order, the Bankruptcy Court expressly stated that any journal entry memorizing the findings and conclusions that it had made on the record would not be effective for purpose of appeal until the conclusion of further proceedings. Id., at 707. The Bankruptcy Court continued the matter until November 7, 1996, and requested briefs from the parties on the issue of the "Court's authority to enforce an agreement that has been presented and approved by the Court, although not made it's [sic] order, and then violated by a person who was involved as the debtor in the bankruptcy case." Id.; *see* Appellant's Appendix, Tab 14, Minute Entry. The Bankruptcy Court did not make any findings of fact or conclusions of law with regard to Midwest Health's conversion action as part of its Oral Order.

Instead of filing a brief on the question raised by the Bankruptcy Court, Midwest Health filed a Motion to Reconsider the Oral Order. A hearing on the Motion to Reconsider was held on November 7, 1996, and a Minute Entry of the hearing records that the Bankruptcy Court stated:

> Court will review again, does believe acts were egregious breach of contract but could not rule in Pltfs favor with what had before it. That is why Court asked counsel to look at under [section] 105. Court will review under advisement, if Court rules in favor of Defs counsel can then file briefs previously requested.

Appellant's Appendix, Tab 14, Minute Entry (so in original).

On March 31, 1997, the Bankruptcy Court issued its "Memorandum Opinion on Plaintiff's Motion to Amend or Reconsider," the Reconsideration Order now before this Court, denying Midwest Health's Motion for reconsideration, stating "[t]his Order supplements the findings and conclusions read into the record on September 27, 1996 [(the Oral Order)]." Zipper, 207 B.R. at 699. The Bankruptcy Court also attached to the Reconsideration Order and incorporated by reference the following documents: (1) a partial transcript of June 8, 1992 hearing at which the settlement agreement in the Relief from Stay

Litigation was read into the record; (2) a copy of the Journal Entry dated June 19, 1992; and (3) a partial transcript of the hearing at which the Bankruptcy Court stated its Oral Order. Id. In the Reconsideration Order, the Bankruptcy Court did not address Health Midwest's conversion claim or the fact that, pursuant to its ruling on November 7, 1996, the parties had additional time to submit briefs on 11 U.S.C. § 105(a) issues. This appeal followed.

II. DISCUSSION

Neither Health Midwest, the Debtor nor Browning have addressed our jurisdiction over this appeal. Despite this fact, we have an obligation to search the pleadings to inquire into our authority to decide the questions presented by the parties. Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1071-72 (1997) (citing Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)).

Initially, we note that Health Midwest's Notice of Appeal states that it appeals the Oral Order and the Reconsideration Order. Appellant's Appendix, Tab 18. Neither of these Orders are judgments "set forth on a separate document" as required by Fed. R. Bankr. P. 9021, which makes Fed. R. Civ. P. 58 applicable to bankruptcy proceedings. In addition to copies of the Oral Order and the Reconsideration Order, however, Health Midwest attached to its Notice of Appeal a copy of a Judgment and a Notice of Entry of Judgment related to the Bankruptcy Court's Oral Order and Reconsideration Order. The Judgment is a separate judgment under Rule 9021.

Health Midwest's failure to expressly refer to the Judgment in its Notice of Appeal does not render its appeal jurisdictionally defective under Fed. R. Bankr. P. 8001(a). Rule 8001(a) does not compel an appellant to designate the judgment appealed, but rather only requires that a "notice of appeal shall conform substantially to [Official Form No. 17]," which suggests that the name and date of the judgment appealed should be identified. Fed. R. Bankr. P. 8001(a); *see* Official Form No. 17; United States v. Arkison (In re Cascade Roads, Inc.), 34

F.3d 756 (9th Cir. 1994); *compare* Fed. R. App. P. 3(c) (requiring appellant to "designate the judgment, order or part thereof appealed from"); *see generally* Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) (appellate rules related to notice of appeal should be liberally construed and mere technicalities should not stand in the way of consideration of a case on its merits); Foman v. Davis, 371 U.S. 178 (1962) (where rule related to naming judgment appealed was substantially complied with and intent to appeal judgment was "manifest," no bar to appellate jurisdiction); Storage Tech. Corp. v. United States Dist. Court, 934 F.2d 244, 247 (10th Cir. 1991) (rules for filing of notice of appeal in bankruptcy are mandatory and jurisdictional). Health Midwest's intent to appeal the Bankruptcy Court's Judgment is clear and it adhered to the Local Rules of this Court by attaching the Judgment, Oral Order, and Reconsideration Order to its Notice of Appeal. 10th Cir. BAP L.R. 8001-1(b).

Despite overcoming potential problems with Health Midwest's Notice of Appeal, we conclude that we cannot consider the merits of this appeal because we lack jurisdiction under 28 U.S.C. § 158(a)(1). Section 158(a)(1) provides that this Court has "jurisdiction to hear appeals from . . . final judgments, orders, and decrees[.]" 28 U.S.C. § 158(a)(1); *see* id. at § 158(c). "[A] decision is ordinarily considered final and appealable under [§ 158(a)] only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1718 (1996) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). The Bankruptcy Court's Judgment is not final and appealable under section 158(a)(1) because it does not end the Contempt Proceeding on the merits. Until the Bankruptcy Court disposes of the conversion and 11 U.S.C. § 105(a) actions, the Judgment is not "final" for purposes of section 158(a)(1). *See generally* Aviles v. Lutz, 887 F.2d 1046, 1047 n.1 (10th Cir. 1989) (trial court must dispose of entire complaint for final appealable judgment).

The Judgment is also not "final" under the collateral order doctrine which requires that an order appealed (1) conclusively determine a disputed question that is completely separate from the merits of the action, (2) be effectively unreviewable on appeal from a final judgment, and (3) be too important to be denied review. Quackenbush, 116 S. Ct. at 1719-20 (relying on Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431 (1985); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)); Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994). The Judgment simply does not meet any element of this test.

Even if orders appealed are not final, in exceptional circumstances we may grant leave to appeal interlocutory orders under 28 U.S.C. § 158(a)(3). *See* Fed. R. Bankr. P. 8001(b) & 8003; Personette v. Kennedy (In re Midgard Corp.), 204 B.R. 764, 769-70 (10th Cir. BAP 1997). Midwest Health did not file a motion for leave to appeal the interlocutory Judgment, but we may treat its Notice of Appeal as motion for leave to appeal. Fed. R. Bankr. P. 8003(c). Appealable interlocutory orders must involve a controlling question of law as to which there is substantial ground for difference of opinion, and the immediate resolution of the order may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b); Fed. R. Bankr. P. 8018(b); Midgard Corp., 204 B.R. at 769-70; American Freight Sys., Inc. v. Transport Ins. Co. (In re American Freight Sys., Inc.), 194 B.R. 659, 661 (D. Kan. 1996); Intercontinental Enters., Inc. v. Keller (In re Blinder Robinson & Co.), 132 B.R. 759, 764 (D. Colo. 1991). Immediate resolution of the issues raised by the Bankruptcy Court in the Oral Order and Reconsideration Order would not materially advance the ultimate termination of the Contempt Proceeding and, therefore, leave to appeal the Judgment is denied.

Our conclusion that the Bankruptcy Court's Judgment is a non-final, non-appealable interlocutory order is in accord with decisions of the United States

Court of Appeals for the Tenth Circuit which have held that, as a general rule, orders involving civil contempt are not appealable orders. *See* Consumers Gas & Oil, Inc. v. Farmland Indus., Inc., 84 F.3d 367, 370 (10th Cir. 1996) ("Generally, 'a party to a pending proceeding may not appeal from an order of civil contempt except as part of an appeal from a final judgment . . . .'") (quoting Pro-Choice Network of Western New York v. Walker, 994 F.2d 989, 994 (2d Cir. 1993)); O'Connor v. Midwest Pipe Fabrications, 972 F.2d 1204, 1208 (10th Cir. 1992) ("'[A] finding of civil contempt is not reviewable on interlocutory appeal.' Combs v. Ryan's Coal Co., 785 F.2d 970, 976 (11th Cir.), *cert. denied sub nom.*, Simmons v. Combs, 479 U.S. 853 (1986)."), *quoted in* Consumers Gas, 84 F.3d at 370. While there is an exception to this general rule for contempt orders issued in the post-judgment stage of a case, Consumers Gas, 84 F.3d at 370; O'Connor, 972 F.2d at 1208, the Judgment is not reviewable under this exception because it is not an order issued in the post-judgment stage of the Contempt Proceeding inasmuch as the Bankruptcy Court has not disposed of the conversion or 11 U.S.C. § 105(a) actions.

III. CONCLUSION

For the reasons set forth above, this Court lacks jurisdiction over this appeal under 28 U.S.C. § 158(a). Accordingly, the appeal is DISMISSED WITHOUT PREJUDICE.